FEB 15 1975

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

No. 74-1026

EDWARD GIBSON,

Petitioner,

v.

THE KROGER COMPANY and BAKERY WORKERS LOCAL NO. 372-A OF INDIANAPOLIS, affiliated with the Bakery and Confectionary Workers International Union of America, AFL-CIO,

Respondents.

MOTION TO FILE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AND

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Respondents.

MOTION FOR LEAVE TO FILE
PETITION FOR WRIT OF CERTIORARI

Comes now the petitioner and respectfully moves this Court for leave to file the annexed petition for writ of certiorari under Section 1651 of Title 28, U.S.C., directed to the United States Court of Appeals for the Seventh Circuit to review an opinion and judgment of that Court en-

tered or November 21, 1974, and more particularly described in the petition, and for such other and further relief as may be just and proper.

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and

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THE KROGER COMPANY and BAKERY WORKERS LOCAL NO. 372-A OF INDIANAPOLIS, affiliated with the Bakery and Confectionery Workers International Union of America, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI

The petitioner prays that a writ of certiorari be issued to review a judgment and order entered November 21, 1974, by the United States Court of Appeals for the Seventh Circuit, affirming a judgment adverse to the petitioner, which judgment was entered by the United States District Court for the Southern District of Indiana, Indianapolis Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has been reported at 506 F.2d 647, and a copy of the opinion is in the appendix hereto at pages 1 to 12 of the appendix.

The opinion rendered by the United States District Court for the Southern District of Indiana, Indianapolis Division, was not reported and is appended hereto at pages 13 to 17 of the appendix.

JURISDICTION TO REVIEW

The date of the order and judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed is November 21, 1974. This petition for writ of certiorari was filed within 90 (ninety) days of that date. The jurisdiction of this Court is invoked under Sec. 1254 (1) of Title 28, U.S.C.

QUESTION PRESENTED

Whether the Federal District Court erred in dismissing petitioner Gibson's complaint for alleged lack of jurisdiction when jurisdictional facts were of record and recognized.

STATUTORY PROVISIONS AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 1 of the Federal Rules of Civil Procedure reads in pertinent part as follows:

> "These rules. . .shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 8(f) of the Federal Rules of Civil Procedure reads as follows:

> "Construction of Pleadings. all pleadings shall be so construed as to do substantial justice."

42 U.S.C., Sec. 2000e-5(f)(1) reads in pertinent part as follows:

> "...If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section...the Commission,...shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge..."

The statutory provision conferring jurisdiction upon the trial court is Sec. 706(f)(3) of Title VII of the Civil Rights Act of 1964, as amended, as found in 42 U.S.C.A. §2000e - 5, and it reads in part as follows:

> "(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed,....."

STATEMENT OF THE CASE

I

RELEVANT FACTS

The petitioner Edward Gibson, hereafter referred to as Gibson, is a member of the black minority race and was hired into the employment of The Kroger Company, one of the respondents, hereafter referred to as Kroger, on November 5, 1956, in Kroger's cleaners and pan cleaning department, at Kroger's Indianapolis, Indiana, address. He served in that Department until August 6, 1969, when he was advanced to the position of a helper in the receiving and stock department. He retained that position until April 14, 1972, at which time he had to choose another job because of personnel movements occasioned by the elimination of a job. By application of the collective bargaining agreement between Kroger and the Bakery Workers Local No. 372-A, the other respondent, hereafter referred to as Union, the only job offered to Gibson was in the cleaners and pan cleaning department, which position had less pay than his previous position as a helper. He applied for a position as a forklift operator in Kroger's receiving and shipping department. He was denied that position which was being held by a white employee who had less plant seniority than Gibson. Out of necessity, Gibson accepted the job in the cleaners and pan cleaning department. Racial discrimination by Kroger and the Union was subsequently alleged. On April 28, 1972, Gibson filed a grievance protesting the denial of his request for

the forklift operator job, and the grievance was denied.

On June 22, 1972, Gibson filed a complaint with the Indiana Civil Rights Commission, and on August 15, 1972, he filed a complaint with the E.E.O.C. (R. p. 232). Through the operation of the labor agreement between Kroger and the Union, Gibson's grievance went to arbitration, and on December 8, 1972, the arbitrator held that under the terms of the contract Gibson was not entitled to the forklift operator job which he applied for because, notwithstanding the fact that Gibson had more plant wide seniority than the white employee holding the position; departmental seniority was the controlling factor, under the terms of the contract, in determining who was entitled to the forklift operator job. The job paid more than the only job which Gibson was offered. (R. p. 5). Thus, Kroger's actions were sustained by the arbitrator (R. pp. 21, 224). The lawsuit was filed on March 9, 1973, in the United States District Court in Indianapolis, and on August 20, 1973, the E.E.O.C. issued a Notice of Right to Sue within 90 days to Gibson.

II

THE CASE IN THE FEDERAL DISTRICT COURT

In his complaint Gibson alleged as follows: He is a member of the black minority race and was hired into the employment of the Kroger Company, hereafter referred to as Kroger, on November 5, 1956, in Kroger's cleaners and pan cleaning department, at Kroger's Indianapolis,

Indiana address. He served in that Department until August 6, 1969, when he was advanced to the position of a helper in the receiving and stock department. He retained that position until April 14, 1972, at which time he was laid off. By application of the collective bargaining agreement between Kroger and the Bakery Workers Local No. 372-A, hereafter referred to as Union, the only job offered to him after he was laid off was in the cleaners and pan cleaning department, which position had less pay than his previous position as a helper. He applied for a position as a forklift operator in Kroger's receiving and shipping department. He was denied that position which was being held by a white employee who had less plant seniority than Gibson. Out of necessity, Gibson accepted the job in the cleaners and pan cleaning department. Racial discrimination by Kroger and the Union is alleged.

On April 30, 1973, the Union filed a Motion to Strike. On the same day the Union also filed a Motion to Dismiss on the alleged grounds that Gibson failed to allege notification by the Equal Employment Opportunity Commission, hereafter referred to as E.E.O.C., that the E.E.O.C. found probable cause to believe that a violation of Title VII had occurred. Another alleged ground for dismissal was that Gibson failed to allege that a charge of unlawful employment practice was filed with the E.E.O.C. within 90 days of the occurrence of the alleged unlawful practice. It was also alleged, in effect, that identical facts and circumstances have been previously litigated in an ar-

bitration proceeding, and Gibson does not allege any irregularity in such proceedings.

On May 2, 1973, Kroger filed a Consolidated Motion for (1) dismissal of the action in its entirety for lack of subject matter jurisdiction on the alleged grounds of failure to exhaust jurisdictional prerequisites to the commencement of the action and (2) for the entry of a summary judgment for Kroger and against Gibson "on the grounds that no genuine issue of material fact exists, and Kroger is entitled to a judgment as a matter of law, because the decision of an arbitrator that plaintiff (Gibson) has no contractual right to the job he claims--without regard to the question of race--is dispositive of plaintiff's contract rights and of a Title VII claim based thereon."

The consolidated motion was accompanied by an affidavit executed by the plant manager of Kroger's bakery in Indianapolis. The following allegations were stated in the affidavit, to wit:

Gibson was employed by Kroger on November 5, 1956. On August 16, 1969, he became a helper in the Company's stock and receiving department. Gibson is a member of the Union with which Kroger has a collective bargaining agreement containing a three step in house grievance procedure with binding arbitration as the fourth and final step.

The fourth paragraph of the affidavit reads as follows:

> "4. Because of a business decline at the bakery, plaintiff who had the least departmental seniority in the stock department, was scheduled for temporary layoff from that department. (This was not a layoff from active service at the plant but only a transfer out of the department.) On April 14, plaintiff elected to choose an open available job in the sanitation department. On the following Monday, April 17, plaintiff told the superintendant, Mr. Riggin, that he wanted to bump the "bug" (forklife) operator in the stock department and to replace that employee as operator. The incumbent operator's departmental seniority date was September 1, 1967, i.e., he had greater departmental seniority than Gibson. Plaintiff was advised by the management that the applicable provisions of the labor contract, in the Company's view, precluded him from bumping an employee in that department with more departmental seniority." (R. p. 20)

The affiant also stated that on December 8, 1972, an arbitrator affirmed Kroger's action concerning Gibson.

On August 22, 1973, Gibson filed his answer to the motions to dismiss. In that document it was stated that Gibson filed his Complaint with the Indiana Civil Rights Commission on June 22, 1972, and with the E.E.O.C. on August 15, 1972.

The E.E.O.C. "Notice of Right to Sue Within 90 Days" was attached to Gibson's Answer. It was dated August 20, 1973.

On October 15, 1973, the trial court dismissed the action for alleged lack of jurisdiction.

III

THE CASE IN THE SEVENTH CIRCUIT

A timely appeal was taken of the final judgment to the United States Court of Appeals for the Seventh Circuit. On November 21, 1974, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Southern District of Indiana. In its decision the Court of Appeals cited defects in the petitioner's complaint and pointed out the fact that the notice of the right to sue was not received until after the lawsuit was filed.

On December 26, 1974, the petitioner filed a Motion for Leave to File Rehearing Petition out of Time along with a proposed Motion for Rehearing and Suggestion for an en banc Determination. On December 27, 1974, the United States Equal Opportunity Commission filed a motion of the EEOC for leave to file a brief as amicus curiae by January 10, 1975, in support of appellant's petition for rehearing. On December 30, 1974, the United States Court of Appeals for the Seventh Circuit denied both motions.

REASONS FOR GRANTING THE WRIT

Under 19(1)(b) there are compelling reasons for this Court to grant certiorari. In this case the Seventh Circuit Court of Appeals has rendered a decision in conflict with another Court of Appeals decision on the same matter. The Seventh Circuit ruling is supertechnical and frustrates the underlying policy of Title VII to give the litigant access to federal courts. It is important for this Court to reaffirm the right of a litigant to get his day in court despite a meaningless procedural blunder by his counsel.

According to Rule 1 of the Federal Rules of Civil Procedure, such rules of procedure, "shall be construed to secure the just, speedy, and inexpensive determination of every action." According to Rule 8(f), "all pleadings shall be so construed as to do substantial justice."

According to Wright and Miller, the function of pleadings under the Federal Rules of Civil Procedure is as follows:

> "...The only function left to be performed by the pleadings alone is that of notice. Thus, pleadings under the rules may simply be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon, to provide some guidance as to what was decided for purposes of res judicata, and to indicate whether the case should be tried to the

> court or to a jury. No more is demanded of the pleadings than this; indeed, history shows that no more can successfully be performed by the pleadings." Wright and Miller, Federal Practice and Procedure, Sec. 1202.

The metaphysical proceduralism sanctioned by the Court of Appeals below, cannot be taken lightly if the spirit of the Federal Rules of Civil Procedure is to continue. It is respectfully submitted that certiorari should be granted in this case to review the erosion of the spirit of the Federal Rules of Civil Procedure and to reaffirm established principles of law not to deny access to the federal forum based on meaningless niceties in pleading practice.

The district court below dismissed an action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A., §2000e, for reasons that the receipt of the Equal Employment Opportunity Commission's Notice of Right to Sue letter, a procedural requirement under 42 U.S.C.A., §2000e-5(f)(1) was completed subsequent to the filing of the lawsuit and it was not alleged in the complaint that a complaint was filed with the EEOC. The Court of Appeals below acknowledged receipt of the EEOC Notice of Right to Sue, and such notice of right to sue was attached to Gibson's "Answer to Defendant's Motion to Dismiss." However, the Court of Appeals confirmed the District Court's dismissal on jurisdictional grounds because Gibson did not amend his complaint to reflect the receipt of the notice of Right

to Sue subsequent to the filing of the action. In effect the Court of Appeals justified dismissal upon the grounds that the allegation of necessary jurisdictional fact was in the wrong part of the record.

According to Nagle v. Johnson, 381 F.2d 9 (8th Cir., 1967), jurisdiction may be found from the record as a whole, and one is not restricted to viewing only the complaint. Thus, there is, in effect, a conflict between circuits as to whether one may go outside of the complaint to find jurisdiction.

The decision of the Court of Appeals is also in conflict with the Sixth Circuit Court of Appeals decision in Marlowe v. Fischer Body, 489 F.2d 1057 (6th Cir., 1973). In the Court of Appeals decision below for which certiorari is sought, the Court stated that the district court cannot be expected to amend a defective complaint. The opposite conclusion was reached in Marlowe, supra, in which case the Court of Appeals remanded the case to the District Court for amending the complaint and for other reasons.

The decision of the Court of Appeals for which certiorari is sought is also in conflict with applicable decisions of this Court. In Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957), the plaintiff filed an action against his labor union for an alleged breach of the union's statutory duty to fairly represent all employees in the union without hostile discrimination. This Court in Conley, stated as follows:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principal that the purpose of pleading is to facilitate a proper decision on the merits." 355 U.S. 401 at 48.

In quoting Conley v. Gibson, supra., this Court, in a more recent case stated in Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962), as follows:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided by such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a decision on the merits.' Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed 2d 80. The rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1." 371 U.S. 178, 181-182, 83 S.Ct. 227, 230.

There is no doubt that the case load of the Federal District Courts and the Courts of Appeal are growing by leaps and bounds every year and the ability to

meet this increasing burden is substantially taxed. There are overwhelming temptations to dispose of a case by dismissal on grounds of proceduralism, since this takes much less time than disposing of the case on the merits. To what extent a court can avoid a decision on the merits by finding procedural pretexts for disposing of the case is a question calling for an answer and supervision from this Court.

CONCLUSION

For the foregoing reasons the petitioner respectfully urges that a writ of certiorari be issued to the United States Court of Appeals for the Seventh Circuit to review its decision for which certiorari is sought.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 73-2132

EDWARD GIBSON,

Plaintiff-Appellant,

v.

THE KROGER COMPANY and BAKERY WORKERS LOCAL NO. 372-A OF INDIANAPOLIS, affiliated with the Bakery and Confectionary Workers International Union of America, AFL-CIO,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division — No. IP 73 C 105
William E. Steckler, *Judge*

ARGUED SEPTEMBER 17, 1974 — DECIDED NOVEMBER 21, 1974

Before SPRECHER and TONE, *Circuit Judges*, and PERRY, *Senior District Judge.**

PERRY, *Senior District Judge.* This is an appeal from a judgment of the District Court in favor of the defendants, The Kroger Company ("company") and Bakery Workers Local No. 372-A of Indianapolis, affiliated with the Bakery and Confectionary Workers International Union of America, AFL-CIO ("union"), in a civil rights action brought by the plaintiff, Edward Gibson, for damages resulting from the company's denial of Gibson's application for the position of forklift operator in the

* Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

Stock and Receiving Department of the company's Indianapolis bakery subsequent to the loss of his position of helper in said department due to production cutbacks.

Gibson is a member of the Negro race. He was hired by the company in November, 1956, and was assigned to the Cleaning and Pan Cleaning Department where he worked until August, 1969, when he was advanced to the position of Helper in the Stock and Receiving Department ("stockroom").

In April, 1972, there were five employees, including Gibson, in the stockroom. Of the five employees, Gibson had the least priority in the department, i.e., he had the least time in the department itself; however, he had greater plant-wide seniority than two of the five. When, — as a result of production cutbacks, — the number of employees required to operate the stockroom was reduced from five to four, Gibson, being lowest in departmental seniority, was transferred out of the department and was given the opportunity to select, in any other department of the plant, any position held by an employee having less plant-wide seniority than Gibson had. Immediately thereafter, on or about April 17, 1972, Gibson asked to be transferred back into the stockroom and to displace ("bump") the employee who was the forklift ("bug") operator in that department. Gibson's request was denied on the grounds that (1) the company's agreement with the union ("labor agreement") did not permit an employee to "bump", within his own department, another employee with greater departmental seniority; and (2) Gibson's contractual prerogative to "bump" other employees with less plant-wide seniority applied only to departments other than the department from which Gibson had been displaced (by virtue of his junior departmental seniority).

On April 28, 1972, pursuant to the procedure prescribed in the labor agreement for resolution of disputes over the proper interpretation of the labor agreement, Gibson filed a written grievance in which he claimed that he had a contractual right, under the collective bargaining agreement, to "bump" the stockroom "bug" operator who

had less plant-wide seniority than Gibson, irrespective of their relative departmental seniority.

On June 22, 1972, Gibson filed a complaint with the Indiana Civil Rights Commission, and on August 15, 1972, he filed a complaint with the Equal Employment Opportunity Commission ("EEOC" or "Commission"). Meanwhile, pursuant to the labor agreement between the company and the union, Gibson's grievance was not resolved through the three-step contractual grievance procedure and, in accordance with the labor agreement, an impartial arbitrator was selected to hear the case and render a decision.

On October 30, 1972, the grievance, — together with a related group grievance of some other employees who had been transferred in consequence of the reduction in force, — was arbitrated before Mr. David Dolnick, an eminent labor arbitrator. Gibson was represented at the hearing both by an attorney for the union and by his own personal counsel, who was given an opportunity to participate in the hearing and in the presentation of evidence on Gibson's behalf.

On December 8, 1972, Arbitrator Dolnick issued a detailed opinion denying Gibson's grievance and the aforesaid group grievance. He ruled that under the terms of the labor agreement Gibson was not entitled to the job of "bug" operator because, notwithstanding the fact that Gibson had more plant-wide seniority than the white employee holding the position, departmental seniority was, under the terms of the agreement, the controlling factor in determining entitlement to the "bug" operator job. The arbitrator thus sustained the company's interpretation that the labor agreement required the company to permit the "bug" operator to retain his position, and did not allow the company to displace him with Gibson.

Arbitrator Dolnick went on to decide the grievances of some 17 other white and black employees on the same principle: all employees—black or white, male or female—whose jobs were affected by the temporary reduction in force could exercise plant-wide seniority

only to replace a less senior full-time employee in another department.

On March 9, 1973, three months after the arbitrator's decision was rendered, Gibson brought this action, alleging that the company and the union had engaged in unfair employment practices as to him, in violation of Title VII of the Civil Rights Act of 1964, as amended ("Act) (42 U.S.C. §§2000e, *et seq.*).

In his complaint Gibson alleged that he had been discriminated against in that he had not been permitted to displace a white employee whose job assignment Gibson desired. The complaint did not, however, allege that Gibson had either pursued or exhausted the administrative remedies prescribed by the Act through the EEOC. Nor did the complaint allege that Gibson had received any notice of right to sue from the EEOC.

On April 30, 1973, the union filed a motion to dismiss, in which several defects in Gibson's complaint were alleged. One such alleged defect was Gibson's failure to allege and to attach, as an exhibit, a letter from the EEOC giving notice of right to sue ("right-to-sue notice").

On May 2, 1973, the company filed a consolidated motion seeking dismissal of Gibson's action, or a summary judgment for the company. One alleged basis for the company's motion to dismiss was that Gibson had failed to satisfy the jurisdictional requirements for the commencement of a civil action under Title VII of the Act because of his failure to allege receipt of, or to file a copy of, any right-to-sue notice from the EEOC.

On August 22, 1973, Gibson filed a memorandum of law in opposition to the aforesaid motions of the defendants. The memorandum was denominated "Answer To Defendants' Motion To Dismiss". Attached thereto was a right-to-sue notice to Gibson from the EEOC dated August 20, 1973.

On October 15, 1973, the District Court granted defendants' motion to dismiss for lack of jurisdiction on the ground that the right-to-sue notice was a jurisdictional requirement.

Gibson contends that the District Court erred in concluding that it lacked jurisdiction to hear and determine Gibson's action. Gibson argues that although his complaint lacked any allegation that Gibson had pursued or exhausted the administrative remedies prescribed by Title VII of the Act and any allegation that Gibson had received a right-to-sue notice from the EEOC, nevertheless at the time of dismissal the District Court had the requisite jurisdictional facts before it in the form of Gibson's Answer To Defendants' Motion To Dismiss, wherein Gibson stated that he had filed a complaint with the Indiana Civil Rights Commission on June 22, 1972 and with the EEOC on August 15, 1972, and that he had received his right-to-sue notice from the EEOC on August 20, 1973. Gibson further argues that the right-to-sue notice was attached to the aforesaid Answer, and that the District Court acknowledged in its opinion that Gibson received his right-to-sue notice on August 20, 1973.

Gibson summarizes his argument in these words:

> Although the Complaint may have had some gaps with respect to Title VII matters, the bureaucratic procedures which the trial court considered critical with respect to its jurisdiction were complied with at the time that the Court said that it had no jurisdiction . . .

The company contends that Gibson ignored a basic jurisdictional prerequisite to a Title VII civil action by commencing his action prior to the issuance of a right-to-sue notice from the EEOC. The company asserts that the basic jurisdictional prerequisite which Gibson ignored is contained in the following language of 42 U.S.C. §2000e-5(f)(1):

> . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . the Commission, . . . shall so notify the

> person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . .

We agree with the company.

Although Title VII of the Act provides each complainant with an absolute right to bring a civil action in federal court, it is well settled that the administrative remedies available from the EEOC must be "exhausted," in the traditional sense of the term, as a prerequisite to the commencement of such action. *Beverly v. Lone Star Lead Const. Corp.*, 437 F.2d 1136, 1139 (5th Cir. 1971), and cases cited therein.

This Court held in 1968 that the requirement that a complainant must invoke the administrative process within the time limitations set forth in section 706(d) of the Act is a jurisdictional precondition to the commencement of a court action, and that there are only two additional jurisdictional prerequisites for such commencement of court action: first, a notification to the aggrieved party by the Commission that it has been unable to obtain voluntary compliance, and, second, the action must be filed within thirty days after the notification. *Choate v. Caterpillar Tractor Company*, 402 F.2d 357, 359 (7th Cir. 1968).

Gibson did not allege in his complaint that he had filed charges with the EEOC. Nor did he allege that more than 60 days had expired since filing charges with the EEOC and that he had requested a right-to-sue notice from the Commission. We think that our decision in the case at bar is controlled by our holding in *Cox v. United States Gypsum*, 409 F.2d 289 (7th Cir. 1969), *reh. denied*, 409 F.2d 289 (7th Cir. 1969). In *Cox*, seven laid-off women employees filed charges with the EEOC claiming discrimination on account of their sex. More than 60 days thereafter, the women filed a civil action against their company and their union under Title VII of the Civil Rights Act of 1964. The Act (42 U.S.C. §2000e-5(e)) gave the EEOC 60 days to secure a conciliation agreement (voluntary compliance). The EEOC had given no notice to the plaintiffs, as was provided in

the Act, that it had been unable to obtain voluntary compliance, but the plaintiffs had rejected the offer of the company before bringing their action. The plaintiffs argued that their own rejection of the company's offer, after 60 days had expired, established the inability of the EEOC to obtain voluntary compliance, and notice thereof to the plaintiffs, so that the 30-day period within which the Act allowed commencement of action had begun. This Court rejected this theory, saying:

> . . . Although plaintiffs were in a position immediately to demand and obtain notice from the commission [EEOC], so that notice may be no more than a formality under the circumstances of this case, we think it is an important formality. Congress has limited the period within which an action may be begun to thirty days. The shortness of the period makes it all the more important that the time from which it runs be definitely determinable. . . .
>
> 409 F.2d at 291.

In the case at bar, unlike *Cox*, Gibson did not even allege that he had attempted to utilize the procedures available through the EEOC to reach voluntary compliance.

In our Order denying the petition for rehearing in *Cox*, we said:

> Our decision, affirming that of the district court, in part, turned on the fact that the commission had given no notice of inability to secure voluntary compliance under 42 U.S.C. §2000e-5(e). Plaintiffs now inform us that on July 6, 1967, after they commenced their action, the commission wrote to each plaintiff as follows:
>
> "We have been informed that you and the other Charging Parties have commenced suit against both the Union and the Company.
>
> "We regret that it was not possible to resolve this dispute through the conciliation processes of the Commission. Should you feel that the Commission's services may be helpful during the litigation, please feel free to call upon us."

Plaintiffs suggest that these letters might be construed to constitute the statutory notice of inability, not previously called to the court's attention. Plaintiffs' court-appointed counsel was unaware of these letters until April 28.

Defendant, takes the position, among others:

> "Moreover, the letters issued by the Commission under date of July 6, 1967 do not comply with Section 706(e) of the Act which provides that if the Commission has been unable to obtain voluntary compliance, 'the Commission shall so notify the person aggrieved and a civil action may, within 30 days thereafter, be brought against the respondent named in the charge.' *The letters dated July 6, 1967 were subsequent to the institution of the action in the court* below and in recognition of the fact that suit had been started on the charges, instead of a notification, as required by Section 706(e), that the Commission had been unable to obtain voluntary compliance."

Under the circumstances of this case, *we agree with the defendant's statement*, just quoted. [Emphasis added.]

Order on Rehearing, May 16, 1969.

Gibson relies heavily upon *Hoover v. Opportunities Industrialization Center of the Roanoke Valley, Inc.*, 348 F. Supp. 657 (W.D. Va. 1972) where the District Court said, regarding a right-to-sue letter which was received 13 days after a Title VII action was filed:

> . . . the filing of the complaint prior to receipt of notice, which was shortly forthcoming, is not sufficient grounds for dismissal of the plaintiff's complaint. 348 F. Supp. at 661.

We agree with the court below that the facts in the case at bar are clearly distinguishable from those in *Hoover*. Gibson, unlike the plaintiff in *Hoover*, did not even allege in his complaint that he had previously filed charges with the EEOC, much less allege that he was about to receive notice from the EEOC of his right to

sue. In *Hoover*, after the right-to-sue notice was received from the EEOC, the plaintiff requested and was given leave to file an amended complaint. After Gibson received his notice from the EEOC, he hade no attempt to request leave to file an amended complaint. The *Hoover* court could see that the plaintiff had substantially complied with the procedural aspects of the Act. Gibson, however, chose to ignore these procedural aspects. Moreover, the *Hoover* court recognized the force of *Cox*, for it went to considerable length to distinguish it, after first stating:

> . . . this case [*Cox*] has been cited frequently as the leading authority on interpretation of the "notice of failure of conciliation", section 706(e) of the Civil Rights Act.

In his brief (p. 9) Gibson contends:

> "Bureaucratic delay should not stifle a party in the exercise of his civil or Title VII rights. Congress has mandated quicker action from the E.E.O.C. [citation omitted]. Bureaucratic procrastination or delay should not stifle or hinder a party with respect to the free exercise of his Title VII or civil rights [citation omitted]."

It is ironic that Gibson's own course of conduct is responsible for his situation. He did not request notice to sue from the EEOC prior to the decision of the arbitrator, and he did not request notice prior to filing suit. We agree with the union that Gibson's failure to have the right-to-sue notice from the EEOC at the time of commencement of suit is directly attributable to his own delay in requesting same. Furthermore, there is no indication of the existence of any special circumstances which might have made it a hardship for Gibson to seek said notice. Thus the doctrine enunciated in *Stebbins v. Continental Ins. Companies*, 442 F.2d 843 (D.C. Cir. 1971), is applicable to the case at bar. In *Stebbins* the Court held that where the plaintiff, who filed with the EEOC a charge that he had been denied the position of claims adjuster on racial grounds, did not claim that it was a hardship for him to seek notice from the EEOC (that it was unable to obtain voluntary compliance), and

On appeal, Gibson raises for the first time the contention that the District Court should not have dismissed the complaint because even if the court lacked jurisdiction under Title VII of the Civil Rights Act of 1964 as amended, it still would have jurisdiction under the Civil Rights Act of 1886 (42 U.S.C. §1981). We agree with the company that this contention must be rejected for the reason that at no point until his brief on appeal has Gibson raised any claim or asserted jurisdiction under the latter statute. The principle that new issues or new bases for liability may not be raised for the first time on appeal is too well known to require citation. In *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 874 (6th Cir. 1973), the plaintiffs filed a complaint alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964. The plaintiffs moved during the trial, at the close of their evidence, to amend their complaint to allege an additional cause of action under the Civil Rights Act of 1866, specifically to obtain the benefit of alleged discriminatory activities prior to the effective date of Title VII of the Civil Rights Act of 1964 (July 2, 1965). The court below denied this motion. The Court of Appeals held that the trial court did not err in denying the motion. The Court, at 486 F.2d 873-874, quoted the following language from *Nevels v. Ford Motor Co.*, 439 F.2d 251, 257 (5th Cir. 1971):

> While it is generally true that leave to file amendments should be freely given, FED. R. CIV. P. 15(a), amendments should be tendered no later than the time of pretrial, unless compelling reasons why this could not have been done are presented. . .

Just as the Court in *Head* found no compelling reason why the plaintiffs could not have moved to amend their complaint earlier than they did, we find no reason why Gibson, prior to the trial court's decision, could not have moved to amend his complaint to include an allegation under 42 U.S.C. §1981.

For all of the foregoing reasons, the decision of the District Court is Affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

EDWARD GIBSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 73-C-105
THE KROGER COMPANY and BAKERY WORKERS LOCAL NO. 372-A OF INDIANAPOLIS, AFFILIATED WITH THE BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO,	)	
	)	
Defendants.	)	

ORDER ON MOTION TO DISMISS

October 15, 1973

This action has been brought under Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. §2000e.

Since 1956, the plaintiff has worked for the Kroger Company; since 1969, he has worked in the Stock and Receiving Department. As a result of production cutbacks, the number of employees in the department was reduced by one man. The plaintiff had the least amount of departmental seniority of the department's employees and was transferred out of the department. Shortly thereafter the plaintiff asked to be returned to the department and to "bump" one of the remaining employees working in

the department on the basis of plaintiff's greater plant-wide seniority. Kroger denied his request pursuant to its understanding of the bargaining agreement which did not allow one employee to displace another employee in his own department when that employee had greater departmental seniority. After the parties could not resolve the issue and according to the labor contract, an impartial arbitrator was selected to hear the case and render a final decision. At the hearing, the plaintiff was represented by counsel and allowed to participate and present evidence, but declined to do so. The arbitrator interpreted the relevant portions of the labor contract to mean that the plaintiff could not use his greater plant-wide seniority to "bump" a man from his own department when that man had greater departmental seniority. Thereafter, the plaintiff filed a complaint with this Court, alleging that the Kroger Company and his union, Bakery Workers Local No. 372-A, violated Title VII of the Civil Rights Act. The plaintiff did not allege in his complaint that he had received notice from the EEOC of its failure to seek voluntary compliance nor, in fact did he allege that he had even filed a complaint with the EEOC.

Defendant Kroger Company has now moved to dismiss this action for lack of jurisdiction or to grant it summary judgment and, alternatively, to strike a portion of plaintiff's claim for damages and deny the request for a jury trial. Because of the disposition of the first motion, this Court will not be required to rule on the other motions.

The issue before this Court today is

whether the plaintiff must obtain a notice of right to sue from the EEOC before proceeding in court and whether proceeding in court prior to obtaining such notice is grounds for dismissal. This court concludes that it must dismiss for want of jurisdiction.

A district court in Indiana rules on this issue and others in Cox v. United States Gypsum Co., 284 F.Supp. 74 (N.D. Ind. 1968), mod. and aff. 409 F.2d 289 (7th Cir. 1969). Cox held that a notice from the EEOC of its failure to secure voluntary compliance is a prerequisite for the district court's jurisdiction. The Seventh Circuit concluded:

> "Although plaintiffs were in a position immediately to demand and obtain notice from the commission, so that notice may be no more than a formality under the circumstances of this case, we think it is an important formality." 409 F2d at 291.

In response to the defendant's motion to dismiss, plaintiff Gibson attached a notice of right to sue from the EEOC, dated August 20, 1973. Plaintiff contends that this notice should relate back to the time his complaint was filed, March 9, 1973. Plaintiff relies on the district court case, Hoover v. Opportunities Indus. Ctr. of Roanoke Val., Inc., 348 F.Supp. 657 (W.D. Va. 1972), which, of course, is not binding on this Court. Even though the Hoover case does not support the plaintiff's position herein, the facts are clearly distinguishable. (This Court notes that the district court in Hoover attempted to

distinguish Cox for the same reasons stating: "This case differs from Cox in that a 'right to sue' letter was sent to plaintiff thirteen (13) days after he instituted action in the district court. *** In this instance, the court does not consider a thirteen day difference between filing of the complaint and receipt of notice of right to sue so significant as to bar a trial of this case on the merits.") In plaintiff Gibson's case, however, at least six (6) months elapsed from the filing of the complaint to the receipt of notice. Furthermore, the plaintiff, unlike the plaintiffs in Hoover, does not even allege in his complaint that he has previously filed notice with the EEOC, much less allege that he is about to receive notice from the EEOC of his right to sue.

Finally, recognizing that this Court is without jurisdiction at this time to rule upon the merits, nevertheless, this Court in passing would note in fairness to the parties that it appears to this Court that Plaintiff could not prevent a summary judgment for the defendants.

The arbitrator interpreted the labor contract in such a way that established that plaintiff had no right to the job he sought and that the other party had a right to be "bumped" by a man with less departmental seniority. Federal Courts are limited in their ability to reverse an arbitration award. Title 9 U.S.C. §10 (1970). The allegations of racial discrimination are immaterial when there is no basis for overturning the arbitrator's finding that plaintiff could not be allowed, according to the labor agreement, to hold the position he sought.

WHEREFORE, this Court having considered said motion to dismiss, the affidavit and/or briefs in support thereof and in opposition thereto, and being duly advised in the premises, concludes that said motion to dismiss for lack of jurisdiction should be, and it is, hereby GRANTED.

/s/ William E. Steckler
United States District Judge

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1026

EDWARD GIBSON, *Petitioner,*

v.

THE KROGER COMPANY, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT THE KROGER CO. IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court for the Southern District of Indiana is unreported but appears at R. 236. The opinion of the Court of Appeals for the Seventh Circuit is reported at 506 F.2d 647. Copies of both opinions are attached to the Petition for Writ of Certiorari.

STATUTE AND COURT RULES INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, § 705 (42 U.S.C. § 2000e-5) and Rules 8(a)(1),

12(b)(1), 12(h)(3) and 41(b) of the Federal Rules of Civil Procedure, the pertinent text of which are set forth at pp. 9-10 of this Brief (Appendix).

QUESTION PRESENTED

Whether the District Court erred in concluding that it was without jurisdiction of petitioner Gibson's action and in dismissing his Complaint without prejudice, when Gibson failed to allege pursuit or exhaustion of his Title VII administrative remedies and subsequently failed to amend his Complaint to add those necessary allegations, including his receipt of a belated right-to-sue letter, despite being on actual notice of such jurisdictional infirmities for five and one-half months.

STATEMENT OF THE CASE

On March 9, 1973, petitioner Edward Gibson ("Gibson"), commenced a civil action in the United States District Court for the Southern District of Indiana complaining that respondents The Kroger Co. ("Kroger") and the Bakery Workers Local No. 372-A of Indianapolis ("Union") had engaged in unlawful employment practices proscribed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (R. 4). The Complaint did not allege that Gibson had pursued or exhausted his state or federal administrative remedies prescribed by Title VII, did not plead any excuse for not exhausting those remedies, and did not allege the receipt of, or attach, a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC").

On April 30, 1973, the Union filed a Motion to Dismiss the Complaint for lack of jurisdiction over the subject matter and other reasons (R. 8), noting that:

> "Plaintiffs complaint fails to allege and attach as an exhibit, notice from the E.E.O.C. that the Commission has found probable cause to believe that a violation of Title VII has occurred. The complaint also fails to allege that a charge was filed within ninety days of the alleged unlawful employment practice." (R. 10).

On May 2, 1973, Kroger moved for dismissal of Gibson's action for, among other reasons, lack of subject matter jurisdiction (R. 16), noting that:

> "Plaintiff has not alleged that he has exhausted his administrative remedies under Title VII and has not alleged that the EEOC has issued a notice of right to sue. As a consequence, this Court lacks jurisdiction of the lawsuit, and plaintiff's action must be dismissed." (R. 30).

By Motion and Order of July 6 and 9, 1973, Gibson was granted an enlargement of time until August 15, 1973, to respond to the motions to dismiss. (R. 228 and 230). On August 22, 1973, Gibson filed an unverified legal memorandum in opposition to those motions (denominated "Answer to Defendant's Motion to Dismiss") which acknowledged that the items pointed out by defendants were jurisdictional prerequisites to a Title VII civil action, stated that they had been satisfied and attached a purported EEOC notice of right to sue dated August 20, 1973. (R. 231).

On October 15, 1973, the District Court granted Kroger's motion to dismiss for lack of jurisdiction, reasoning that Gibson "does not even allege in his complaint that he had previously filed notice with the EEOC, much less allege that he is about to receive notice from the EEOC of his right to sue." (R. 236, 238). Pursuant to Gibson's November 14, 1973, Notice of Appeal (R.

240), the United States Court of Appeals for the Seventh Circuit on November 21, 1974, affirmed the dismissal, declaring that, "Gibson's own course of conduct is responsible for his situation." (506 F.2d 647, 652).

Gibson now petitions this Court for a writ of certiorari to review the decision of the Court of Appeals. Kroger received its copies of Gibson's Petition on February 18, 1975.

Gibson's Petition presents a single question of law, *i.e.*, whether his unexcused failure to satisfy the jurisdictional prerequisites of a Title VII action required its dismissal and whether the Court of Appeals properly affirmed that determination of the District Court.

ARGUMENT

There are no sound reasons for this Court to exercise its discretion to review by writ of certiorari the decision of the Court of Appeals in this action. All this case involves is the dismissal of a civil action, *without* prejudice and *before* any limitations bar, because of Gibson's failure to allege pursuit and exhaustion of administrative remedies and to secure a right-to-sue letter from the EEOC (admittedly jurisdictional prerequisites to the action) despite a half-year's notice by Respondents setting forth the fatal defects in the Complaint. This case does not involve any "supertechnical" ruling by the Court of Appeals conflicting with decisions of this Court or other courts of appeal, with the spirit of the Federal Rules of Civil Procedure or with the policies of the Civil Rights Act of 1964. (Pet. 10).

Gibson's Complaint attempts to allege a claim for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* That Act is grounded upon a procedure

which requires that such complaints be first heard by administrative agencies specifically established to resolve them. 42 U.S.C. § 2000e-5. Until a complainant has pursued these avenues of administrative relief and has secured an appropriate notice of right to sue from the EEOC, the federal courts do not have subject matter jurisdiction over the claim, and any action commenced before these administrative remedies are exhausted must be dismissed. *Love v. Pullman Co.*, 404 U.S. 522, 92 S.Ct. 616 at 617, 30 L.Ed.2d 679 (1972); 1 CCH *Employment Prac. Guide* ¶¶2405, 2485 and 2545 (1972).

Gibson's Complaint is devoid of allegations indicating either that he has sought and exhausted his administrative remedies or that the federal courts otherwise have subject matter jurisdiction over this case. Federal courts are presumed to be without subject matter jurisdiction over an action until the plaintiff affirmatively pleads it in his complaint (and proves it upon challenge). *Giancana v. Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied* 379 U.S. 1001 (1965); 5 Wright & Miller *Fed. Prac. & Proc.: Civil* §§ 1206 and 1210 (1969). Gibson's omission is not "a meaningless procedural blunder." (Pet. 10). And his citation of *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), and 5 Wright & Miller *Fed. Prac. & Proc.: Civil* § 1202 at 60-61 (1969) is wholly inappropriate, for those authorities concern only the sufficiency of statements of claims under FedR.Civ.P. 8(a)(2).

Kroger and the Union specifically pointed out the fatal jurisdictional omissions of Gibson's Complaint and explained how to cure these defects. (R. 8, 10, 16, 23 and 30). And the District Court waited three and one-half months for an amendment to the Complaint adding

the essential jurisdictional prerequisites. (R. 230). Gibson's response was merely to state in a brief that he had satisfied the jurisdictional prerequisites of his claim, attaching a purported EEOC notice of right to sue which had been requested and obtained five and one-half months *after* the commencement of this action. (R. 231). The District Court then waited an additional two months for the essential amendment, which Gibson could have made as of right under 28 U.S.C. § 1653 and Fed.R.Civ.P. 15(a).

When Gibson persisted in his failure to plead the jurisdictional grounds of his claim, the District Court had no choice but to dismiss this action. *Joy v. Hague,* 175 F.2d 395 at 396 (1st Cir. 1949), *cert. denied* 338 U.S. 870 (1949); Fed.R.Civ.P. 8(a)(1), 12(b)(1) and (h)(3), and 41(b). The dismissal of Gibson's action is neither a function of "metaphysical proceduralism" nor an effort by the District Court 'to meet an increasing case load burden.' (Pet. 11 and 13-14). Gibson's memorandum in opposition to dismissal is not a "pleading," Fed.R.Civ.P. 7(a), much less a "complaint," Fed.R.Civ.P. 3 and 8(a), to be construed pursuant to Fed.R.Civ.P. 8(h). And the decisions in *Marlow v. Fisher Body,* 489 F.2d 1057 (6th Cir. 1973), and *Neagle v. Johnson,* 381 F.2d 9 (8th Cir. 1967), consistent with the rules which compelled this dismissal, merely acknowledge that a plaintiff should be allowed to amend his complaint to allege federal question jurisdiction when the record elsewhere indicates that such jurisdiction exists.

Even after the dismissal on October 15, 1973, Gibson had two options which would have saved his claim; he could have moved the District Court for relief from mistake, inadvertance or excusable neglect with leave to amend his Complaint to add the necessary jursdictional

statement, Fed.R.Civ.P. 60(b)(1) and 15(a); or he could have recommenced his civil action with a properly composed complaint, since the dismissal was without prejudice and before the 90-day limitations bar upon his purported right-to-sue notice of August 20, 1973. Fed.R. Civ.P. 41(b) and 42 U.S.C. § 2000e-5(f)(1). Gibson, however, through the person of one of the attorneys representing him upon this Petition for Writ of Certiorari, chose to seek the appeal about which he now complains.

The decision of the Court of Appeals merely explains the jurisdictional prerequisites to commencement of a Title VII action, finds no hardship, excusable neglect or other proper reason for Gibson's noncompliance and observes:

> "This Court should not reverse the judgment of the District Court in view of Gibson's persistent neglect or refusal to pursue the judicial remedies that were available to him. The defendants' motions to dismiss clearly called Gibson's attention to the fatal fault in his complaint: his failure to allege that he had either pursued or exhausted the administrative remedies prescribed in Title VII of the Act. Gibson could have cured the fault as soon as he received his right-to-sue notice simply by amending his complaint to include the necessary allegations and the fact of his receipt of the notice. Fed.R.Civ.P. 15(a)" 506 F.2d at 652.

Not only was there a failure to do this, the further opportunity to refile the action was eschewed, and Gibson elected to pursue the point on appeal, thus allowing his time to run.

CONCLUSION

For the foregoing reasons, Gibson's Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted.

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APPENDIX

Pertinent Text of Statute and Court Rules Involved

United States Code, Title 42, § 2000e-5:

> (a) The [Equal Employment Opportunity] Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.
>
> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved * * * alleging that an employer [or] labor organization * * * has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge * * * on such employer [or] labor organization * * * within ten days, and shall make an investigation thereof. * * *
>
> (c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, * * *.
>
> (f)(1) * * * If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) * * * whichever is later, the Commission has not filed a civil action under this section * * * or the Commission has not entered into a conciliation

agreement to which the person aggrieved is a party, the Commission * * * shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * *.

Federal Rules of Civil Procedure:

8(a). A pleading which sets forth a claim for relief * * * shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, * * *.

12(b). * * * the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, * * *.

12(h). (3) Whenever it appears by suggestion of the parties of otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

41(b). For failure of the plaintiff * * * to comply with these rules * * *, a defendant may move for dismissal of an action or of any claim against him. * * * a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, * * * operates as an adjudication upon the merits.